Supreme Court, U.S.
FILED
MAY 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1560

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

SHERIDAN ROAD BAPTIST CHURCH, *et al.*,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

William Bentley Ball
Counsel of Record

Philip J. Murren
Sandra E. Wise
BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Michael E. Thomas
Republic Bank Building
3200 Beecher Road
Flint, MI 48504
(313) 733-1000
Counsel for Petitioners

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF REPLY	1
REPLY	2
CONCLUSION	7

TABLE OF AUTHORITIES

Cases: Page

Board of Education v. Allen, 392 U.S. 236 (1968). 2

Pierce v. Society of Sisters, 268 U.S. 510 (1925) . . 3

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 3

Statutes and Regulations:

1979 Mich. Adm. Code, R 390.1145 5

No. 86-1560

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

SHERIDAN ROAD BAPTIST CHURCH, *et al.*,
Petitioners,

v.

STATE OF MICHIGAN,
DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONERS

SUMMARY OF REPLY

The holding of the court below, that a state may shut down church schools and shunt their enrolled children into schools not of the churches' faith — solely to enforce a statute requiring 100% of the schools' teachers to be state-certificated — has never been accorded plenary review by this Court. The record herein affords the Court a highly developed factual basis for decision, not found in any previous case. Decisions of this Court, cited by respondents, in cases such as *Board of Education v. Allen*, *Pierce v. Society of Sisters*, and *Wolman v. Walter* (Br. 4-5)* did not test the issues here presented. The writ should not be denied on the ground that only six states

* The signal "Br." refers to Brief in Opposition.

require state certification of private school teachers; that fact merely strongly suggests that there is no compelling state interest in the enforcing of Michigan's statute in this case. Granting the writ would in no way interfere with the power of fifty state legislatures to select proven, effective means for furthering education of the young. Respondents misrepresent the trial record in critically important details.

REPLY

Petitioners address the following arguments made in the Brief in Opposition:

1. *That Prior Decisions Of The Court Call For Denial Of The Writ.* None of the state court cases cited by respondents (Br. 3-4) embraced evidentiary records comparable in breadth to that developed herein. Three nationally recognized educational experts, an expert on child psychology, a leading scholar in the area of philosophy and religion; pastors, administrators, teachers, and students in the schools, their parents; numerous local school officers and the highest state educational officials supplied testimony and extensive documentary evidence.

Respondents also cite to seven decisions of this Court (*Board of Education v. Allen*, 392 U.S. 236 (1968), etc., Br. 4-5). Not one of these dealt with the questions presented by petitioners (or even by respondents).

2. *That The Writ Should Be Denied Since State Legislatures Should Have Final Authority To "Make Educational Decisions For The People Of Each State." (Br. 6-7).* Respondents fail to say *how* granting the writ (or even subsequently reversing the evenly divided Michigan Supreme Court) would tie the hands of state legislatures in selecting means of furthering education. Respondents' plea is simply an unsupported admonition to the Court that it not involve itself in the question of whether states are immune from constitutional restraints in shutting down schools of churches which

dare not recant doctrine which bars their obeying a law requiring them to hire none but teachers licensed by the state.

3. *That The Churches' Schools May Be Shut Down Without Proof Of A Compelling State Interest Necessitating That Step, Or Proof That Less Restrictive Means Do Not Exist.* (a) Respondents ignore any discussion of the record herein on the essential issue of compelling state interest. Instead they seek to persuade the Court that the compelling state interest in the State's teacher licensing scheme herein is "the secular education of all young people in the state." (Br. 3). Such a generality misconceives the meaning of "compelling state interest." The issue here is not the general proposition that the State has an interest in the secular education of the young. The narrow issue instead is whether enforcing a statute which bars, on pain of closure, a church school from utilizing even one non-certified teacher for its classes is dictated by a compelling state interest. This involves the related issue of whether parents — as the primary educators of their children (*Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)) — shall be denied religious choice of a schooling which, as citizens of highly competent background, they find to be excellent. (J.A. 144a-145a). The record, of course, and the opinion of three Michigan Supreme Court justices, flatly contradict the State's claim of compelling interest. (A-92 — A-103). The fact that 44 states — all conceivably as interested in education as Michigan — do not venture to impose government licensing on private school teachers is evidence that such licensing represents no major societal interest.

(b) So, too, respondents essentially ignore the teaching of this Court (*Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972)) on less restrictive means. The record, as well as the opinion of three Michigan Supreme Court justices, establishes that less restrictive means were amply shown to exist. (J.A. 118a-194a; A-100 — A-103). Respondents,

however, do refer to less restrictive means in one sentence which undoes their claim that the Michigan teacher licensing statute *must* be imposed because *no* less restrictive means can be dreamt of. That sentence is:

> "Other states have recently amended their legislation to provide *different* means of effectuating their compelling interest in the secular education of their resident youths."

(Br. 7. Emphasis supplied). Respondents thus inform the Court that they recognize that *other means do in fact exist* for realizing the common interest in good education.

4. *That The Court Must Treat As Facts Matters Not Found In The Record Or Contrary To The Record.* Respondents utilize their Statement of the Case for argumentation. (Br. 2-3). They here state a series of allegedly factual matters (omitting citation to the record as to all but one of these). (*Ibid.*). These factual assertions are not supported by the record, and the arguments made in the Statement of the Case, based upon them, are false:

a. *No real religious objection to Michigan teacher certification program.* (Br. 2). Respondents imply that petitioners' objections to the program cannot be substantial or sincere, since persons of any religious affiliation, even fundamentalist, have accepted Michigan certificates; even petitioners have no religious objection to hiring Michigan-certificated teachers; and a certificated teacher can teach petitioners' curriculum without violating petitioners' beliefs. (*Ibid.*). Irrespective of whether these assertions are supported by the record, they are absolutely irrelevant and seek to mislead the Court. The *record* establishes that petitioners' religious objections to certification center upon the power of the state (a) to determine who shall or shall not engage in a church ministry (J.A. 67a, 22a-23a), (b) to license church staff (J.A. 67a), (c) to bar an individual from exercising a religious

vocation in the teaching of children (J.A. 19a, 23a, 168a), (d) to suppress exercise of the right of petitioner parents to select these particular schools for their children. (J.A. 130a-149a).

b. *No problem of teacher shortage.* (Br. 2). Respondents (again avoiding record citation) say that the teacher licensing requirement imposes no hardship on petitioners since "[t]here was no testimony at trial that there is a shortage of certificated teachers who share petitioners' religious beliefs or that petitioners cannot staff their schools with certified teachers." (*Ibid.*). In any event, so it is said, 1979 Mich. Adm. Code, R 390.1145 would allow them to employ non-certificated teachers through emergency permits. (*Ibid.*).

To the contrary, petitioners (who best know their own situation) testified that "[t]eacher certification would make it very difficult and burdensome for us to provide teachers for our schools." (J.A. 67a). The administrative regulation, 1979 Mich. Adm. Code, R 390.1145, designed for the public schools, in no way allows for lessening of the churches' teacher supply problem. Its availability depends upon the recommendation of public school officials, state board determination of the person's qualifications, the existence of undefined "emergency circumstances"; and it is valid only during the "emergency." Thus the "emergency permit" concept is utterly irrelevant to the regular, ongoing life of a non-public, church school. Further, even if applicable, it would be subject to the same objections which petitioners have expressed to governmental dictation of who shall carry out the churches' mission to children.

But if the "emergency" provision *can* be used as an effective and practical means of relieving the churches' teacher shortage problem, then the proposition that a compelling state interest dictates that none but state-certified teachers be employed in church schools is shown to be baseless.

c. *"Educational qualifications are desirable in the teaching profession."* (Br. 2). Petitioners emphatically agree, as the record shows. (J.A. 91a-93a; 118a-130a). Respondents seek to minimize the federal constitutional issue before this Court by making it appear that the expert educational witnesses called by petitioners had but a single and trivial educational objection to the teacher certification program — namely, that the candidate for a certificate must take too many hours of education courses. (Br. 2). Notably (again) respondents' factual assertion do not refer to the record. Petitioners respectfully suggest that the testimonies of Dr. Donald Erickson (J.A. 283a-285a), Dr. Russell Kirk (J.A. 205a-222a), Dr. Paul Frederick Schmidt (J.A. 149a-168a), and Dr. Judith E. Lanier (J.A. 100a-118a) render baseless the claims of the State that a compelling state interest requires the imposition of its program on petitioners' schools. It is notable that the record lacks *one iota of statistical or other research evidence* by the State *linking its program to actual student achievement.* The Court should note, in vivid contrast, the results, freely offered for the record, of achievement by the churches' schools on the nationally standardized Stanford Achievement Test and Metropolitan Achievement Tests. (J.A. 120a-121a, 399a-451a). (And see Erickson testimony on the significance thereof, J.A. 282a).

CONCLUSION

For the foregoing reasons, responsive to the arguments contained in the Brief In Opposition, the petition should be granted.

Respectfully submitted,

William Bentley Ball
Philip J. Murren
Sandra E. Wise
BALL, SKELLY MURREN & CONNELL
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Michael E. Thomas
Republic Bank Building
3200 Beecher Road
Flint, MI 48504
(313) 733-1000
Counsel For Petitioners

May 6, 1987